THE STAR ROUTES.

[Continued from First Page.]

absence of statutory provisions for rules to guide them.

IN THE EXERCISE OF THEIR FUNCTIONS

in criminal as well as in civil cases, it is to the statutes of the United States, enacted in pursuance of the Constitution, alone, that it must resort to determine what constitutes an offense against the United States. The United States have no unwritten criminal code to which resort can be had as the source of jurisdiction (page 568):

That while offenses must be defined and created through acts of Congress, in the absence of any enactment regulating the mode in which they may be prosecuted, the mode in existence at the adoption of the Constitution may and should be pursued by the courts of the United States.

In the United States against Reed, 12 Howard, page 361, this general doctrine is annunciated. [Mr. Cook then read at length the authority mentioned.] Your Honor will observe the officers named at whose suggestion it may be filed. At whose instance is this information filed? At

THE INSTANCE OF THE POSTMASTER-GENERAL,

in connection with the Attorney-General, two of the distinctive and permanent officers of the Government. It comes into this court as was the custom in England. Not at the unauthorized zeal or wish of a prosecuting officer, but at the request and direction of the Department of Justice and of the Post-Office Department, in which the alleged misdeeds are asserted to have taken place, and it comes, therefore, on high and official sanction. What is the value of those Departments? How can they maintain their purity if they may not be allowed to prosecute these offenses in accordance with the authorized and sanctified practices which come down to us baptized and canonized by the practice of our ancestors in this country? Government, if Your Honor please, is not, as we are sometimes taught man is, the result of the caprice of the dance

OF ATOMS AND OF ACCIDENTS

of buried worms, of atoms drawing themselves in their progress from infinitesimal existence by various grades until they are developed into the genius and the wisdom and the stature of humanity. It is more. It has its primary origin in the bosom of Divinity. Government on earth is but an epitome of the grand and better forms of government that maintain the eternal throne and out from which come the laws which control humanity, which hold every planet and orb in their system, and gives grandeur and dignity and harmony and civilization and true manhood to earth. And if this be the true conception of government when a single atom of that government, whether enveloped in the official robe or not, attempts to disturb its purity or antagonize the sanctity of its principles, may that atom come before a court of justice and declare that that court

SHALL NOT REACH OUT A HAND

to correct the misconduct and reduce the disorder to order in one of the regularly-established and adopted modes of prosecuting crimes. It is further said, Bishop C. Pro. and Pr.: "In our States criminal information should be deemed to be such and such only, as in England is presented by the attorney or solicitor-general. This part of the English law has plainly become common law with us. The powers which in England are exercised by the attorney-general and solicitor-general are largely distributed among our district attorneys, whose office does not exist in England. The latter officers would seem to be entitled under our common law to prosecute by information as a right adhering to their office, without leave of courts, and such is the doctrine" acted upon in some of the States, though in some of them it is more or less aided by statutes. The Fourteenth Amendment of the Constitution of the United States provides that "no person shall be deprived of life, liberty, or property without due process of law." The Constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless upon an indictment or presentment of the grand jury. But misdemeanor not within this inhibition may in the United States tribunals be proceeded against by information. In Wharton's Criminal Pleading and Practice, pages 87 and 88, we find this: Informations are official criminal statements presented usually by the prosecuting officers of the State without interposition of the grand jury (section 89) in the United States courts:

The conclusion is that for misdemeanors which do not preclude the person convicted from being a witness, there can be a proceeding by information, and hence a person may be prosecuted by information for a violation of the revenue laws. The severity of the punishment does not by itself make a crime infamous.

AND THIS TEXT IS SUPPORTED

by a large number of authorities. In the United States against Maxwell, 3 Dillon, and the United States against Block, 4 Sawyer, page 215, and in case of Shepherd, 1 Abbott, page 436, informations are sanctioned and upheld. It is done by the text-books. Unquestionably it is by the adjudications. Now, then, if Your Honor please, if the proposition can be established it is established. Notwithstanding the declamation against it and denunciations of it, that information is an authorized and proper remedy. It is urged, however, that if it be correct that informations were sanctioned in this country

THEY HAVE FALLEN INTO DISUSE.

It is a maxim of the law: "No time lies against the King, against the government, as respects a remedy—no more than otherwise." Time cannot be invoked as regards the use of a remedy against the Government, but disuse may not be invoked. On page 438, 1 Abbott, this is expressly declared, and in United States against Block, 4 Sawyer, page 216. I cite the pages upon which this point is presented and commented on by the court. The constitution of Maryland, as it existed in 1801,

RECOGNIZED OTHER REMEDIES

than by indictment. Section 19 of the declaration of rights was in these words: "That in all criminal prosecution every man hath a right to be informed of the accusation against him, to have a copy of the indictment or charge in due time, if required to prepare for his defense." It was not simply the indictment, but the bill of rights recognized other forms of charges, and the other form which existed at the period of the adoption of the declaration of rights in Maryland was information. It will shortly appear that they have, as regards minor claims, been fully recognized in the District of Columbia. Informations are supported both by direct terms and by implication in various acts of Congress. I will chiefly

PRESENT THESE IN CHRONOLOGICAL ORDER

and briefly, that time, so far as possible, may be preserved. In volume 1, U. S. Statutes at Large, page 119, sec. 32—

No person or persons shall be prosecuted, tried, or punished for treason or other capital offenses, wilful murder and forgery excepted, unless the indictment for the same shall be found by a grand jury, within three years next after the treason or capital offense shall have been committed; nor shall any person be prosecuted, tried, or punished for any offense not capital, nor for any fine or forfeiture, under any penal statute, unless the indictment—

Does that stop there? No—

unless the indictment or information for the same shall be found or instituted within two years from the committing of the offense.

Now, if Your Honor please, may I direct special attention to this fact: When was this act passed? April 30, 1790. It passed concurrently with the adoption of the amendment to the Constitution requiring the higher crimes to be prosecuted by indictment. It is therefore a cotemporaneous exposition of that provision of the Constitution. It was

THE SAME BODY OF MEN,

to a great extent, who framed the Constitution. It was while they continued to live that this act of April 30, 1790, was passed, which in direct terms, excluding capital offenses from trial by any other mode than by indictment, permits others to be prosecuted by indictment or information. So that the Constitution of the United States, as Your Honor will see, at the very foundation of the Government, and in fact before the amendment in reference to indictment was actually ratified (for it was not ratified until 1791), the Congress of the United States had provided for the use of informations

BY DIRECT LEGISLATION.

That is all. These acts were revised, if Your Honor please, in 1874, by the Congress of the United States, and in that revision they adopted in direct terms, and with but slight and unimportant alterations, the statutes with regard to limitations that had been enacted previously. In section 1044 of the Revised Statutes, "no person shall be prosecuted or punished for treason or other capital offense, wilful murder excepted unless indictment is found within three years, next after such treason or capital offense is done or committed." No person shall be prosecuted, tried, or punished for any offense not capital, except as provided by section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." The very legislation of 1790 which ratified, adopted, and recognized informations in connection with indictments, as concurrent remedies in the prosecution of crimes other than capital, have been re-enacted in 1874, so that there has been a uniform congressional, legislative approval of informations as fully, indeed, if Your Honor please,

IN REGARD TO THIS CLASS OF CRIMES,

where they are allowed, as indictments themselves. By act of Congress, approved June 17, 1870, a Police Court was created in the District of Columbia and continued in force by the Revised Statutes of June 22, 1874. There are one or two sections of the Police Court act which it may be important to refer to: "Prosecutions in the Police Court shall be by information under oath without indictment by a grand jury, or trial by petit jury." Then, in addition to that, it is declared that when parties apply for repeal they shall render recognizance with sufficient surety to be approved by the judge for his appearance at the criminal term. The criminal accusations commenced in the Police Court on informations may be carried into this court by appeal, and when that is done, although it involves the liberty and the rights of the citizen, the trial proceeds in this court on the original information without the touch or intervention of a grand jury. It is provided in section 1079 that it shall be the duty of the United States Attorney in the District, or by one or more of his assistants or deputies, to attend

TO THE PROSECUTION IN THE POLICE COURT

of such offenses as were recognizable in the Criminal Court of the District prior to June 17, 1870. It is true that this relates to offenses in the District not being capital or otherwise infamous, simple assaults and batteries, and all other misdemeanors not punishable by imprisonment in the penitentiary. But by sections 1073 and 1074 any of those cases may be appealed, and tany have been. Even Your Honor has tried a number of these cases, so that, in fact, these informations have been in use in this court, in this very room, by His Honor, who now presides upon the bench. There have been a large number of them, and many have been for larceny. I hold in my hand a catalogue of those cases: Assaults and batteries, 455; maintaining nuisances, 16; riot and affray, 8; violating internal revenue, 4; keeping bawdy and disorderly houses, 59; receiving stolen property, 13; larceny, 189. And of this number, as respects larceny, there have been tried recently a number by Your Honor, and sentence passed. All this seems to have been overlooked entirely. But informations are

EXPRESSLY AUTHORIZED IN THIS COURT.

On the very day the Revised Statutes, in relation to the District of Columbia, was approved another act was passed, which will be found in the supplement to the Revised Statutes of the United States, page 85, which provides:

That the Criminal Court of the District of Columbia shall have jurisdiction of all crimes and misdemeanors committed in said District not triable in any other court, and which are required by law to be prosecuted by indictment or information.

So that there is an enactment of Congress as late as 1874 expressly conferring upon this court the power to take cognizance of all crimes or misdemeanors, not solely by indictment, but also by information. What could be more conclusive? Congress has declared that this court need not be confined to indictments, but that if it sees fit it may adopt informations;

BUT THIS IS NOT ALL.

Upon February 27, 1877, the Police Court had this jurisdiction, but on that day this act was approved. By an act found in the supplement of the Revised Statutes, page 279, this will be found, and it is a question of importance, not only in this case, but perhaps in some others. Section 763 is amended by striking out said section and inserting in lieu thereof the following:

Said courts shall have cognizance of all crimes and offenses committed within said District, and of all places of common law and equity between parties, both or either of which shall be residents within said District; also of all cases of a civil nature, common law or in equity, in which the United States shall be plaintiff or complainant, and of all seizures on land or water, and of penalties and forfeitures made arising or accruing under the laws of the United States, and any one of the justices may hold a criminal court for the trial of all crimes and offenses arising within the district.

THE CRIMINAL JURISDICTION

of this court was thus enlarged. Formerly exclusive, the Police Court ceased to be so, and wisely, so that to-day the Criminal Court has concurrent jurisdiction and power to try all crimes and offenses committed within the District of Columbia. It is not limited, not confined. Now, if Your Honor please, let the two acts to which I have referred be construed in *pari materia*. What then? The one provides that all crimes may be pursued by the medium either of an indictment or an information. This is an enlargement, if possible, of the jurisdiction of the Court, and provides that all crimes and offenses committed within the District shall be committed to the Criminal Court. How? Through the medium provided by previous acts of Congress—by indictment, or by information. The power of proceeding by information is, therefore, expressed direct, positive, and affirmative, not shadowy and uncertain. What did Congress mean when they provided that all crimes within the District of Columbia might be prosecuted by indictment or information? They meant this: that at the option of the proper officers, with the concurrence of the Court, informations or indictments might be indiscriminately used,

THE ONE EQUALLY WITH THE OTHER,

the one with the same effect as the other. But these gentlemen, it appears, would maintain, with the letters of these laws looking at them, glaring at them, that there can be no prosecution of crimes in this court only by indictment. And they grow transcendently eloquent, and they stir anew and fresh currents of the Anglo-Saxon blood until we see it coursing through blue veins with their declarations that no citizen can be accused of crime except in the portals of the grand jury room and through the means of an indictment. Who is the wiser—the Congress of the United States or the learned gentlemen who appear on the part of the defendants? There is the *lex scripti* which no eloquence, which no ardor, which no enthusiasm on the part of these defendants can obliterate.

IT MUST ENDURE IMPERISHABLE,

or at least until the hand of the Congress of the United States erases it from the Statute Book itself. This is not all. There is one provision that may be cited in this connection as illustrative of the others. It is in relation to the prosecution of crimes, on the period in which they may be prosecuted, and it will be found on page 204 of the supplement to the Revised Statutes of the United States.

No person shall be prosecuted, tried, or punished for any offense not capital except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

What could be a clearer and more distinctive and authoritative recognition of the use of informations? And may I say here that the statute of limitation requires that this information should be filed? How it may have happened, why it was, it is not for me to determine; but the fact will live on the annals of this court that the grand jury did take a recess for ten days; that it was not possible to occupy those ten days in the investigation of this case. I had no notice directly or indirectly of that recess of the grand jury. I was called by telegrams to consultations on the spot

WHERE THE ASSASSINATED PRESIDENT

passed away and breathed out his spirit to the God who gave it, in order that preparation might be made for the presentation of this case. I hastened home, after a deliberation with the Attorney-General, and with the Postmaster-General, and with Colonel Bliss. When I reached the Baltimore and Potomac depot it was announced that the grand jury had adjourned. There is the fact. There was but one pathway of duty left open, and with laborious effort and with constant work, often through the hours of the night, this information was prepared and filed. I have no censure upon any one. I have the living, breathing facts to present to Your Honor. There they are. So that there was a necessity for the filing of this information, otherwise the statute of limitation would have been an effectual bar to the prosecution of the matters contained in the information. I will merely glance, if Your Honor please, in this connection at what has been said in regard to the jury disqualification. There is a provision to that effect which constitutes no part of the criminal or penal law of the United States; none whatever. It is only a provision for the purpose of securing a pure and upright jury. It does not attach itself by force of any law as a penalty connected with any crime, but the right to occupy the position as a juryman is not a natural right. It is not even an acquired right. The Supreme Court of the United States in 21 Wallace has decided that even suffrage is not a right which a citizen may claim apart from legislation at all.

THE RIGHTS OF SUFFRAGE

in minor cases was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment does not add to these privileges and immunities. It simply furnishes additional guarantees for the protection of such citizens as already had it. The right of rendering a man infamous was in the nature of taking away the natural fundamental right belonging to the subject, to the citizen, but this position would go too far. It would obliterate, if Your Honor please,

THE DISTINCTION BETWEEN CRIMES

infamous and those which only involve moral turpitude. It would destroy and strike out of existence the Police Court itself, because, if it be true that every offense which involves moral turpitude is infamous, then there can be no trials in the Police Court, for every crime in which it is given jurisdiction involves moral turpitude, and hence it would be necessary to destroy, not simply by legislation, but by judicial decision, the Police Court, for an infamous crime can only be tried originally and primarily by means of an indictment and before a petit jury; so that this position, as Your Honor will see, is distinctive and cannot in itself be sound. But it is only, after all, in cases which are infamous or capital that indictments are required. Now, what is an infamous crime? I will condense what I have to say by a reference to a few authorities. Bouvier's Law Dictionary defines it clearly and definitely. In 1 Greenleaf on Evidence, 372-373, there probably will be found

A CLEAR EXPOSITION OF WHAT IT IS:

Under this general head of exclusion because of insensibility to the obligation of an oath may be ranked the case of *persons infamous*—that is, persons who, whatever may be their professed belief, have been guilty of those heinous crime which men generally are not found to commit unless when so depraved as to be unworthy of credit for truth.

It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require that "the *publicum judicium*" must be upon an offense implying such a dereliction of moral principles as carries with it a conclusion of a total disregard to the obligation of an oath. But the difficulty lies in the specification of those offenses. The usual and more general enumeration is, *treason*, *felony*, and the *crimen falsi*. In regard to the two former, as all treasons and almost all felonies were punishable with death, it was very natural that crimes deemed of so grave a character as to render the offender unworthy to lives should be considered as rendering him unworthy of belief in a court of justice. But the extent and meaning of the term *crimen falsi* in our law is nowhere laid down with precision. In the Roman law, from which we have borrowed the term, it includes not only forgery, but every species of fraud and deceit. If the offense did not fall under any other head it was called *stellionatus*, which included "all kinds of cozenage and knavish practice in bargaining." But it is clear that the common law has not employed the term in this extensive sense when applying it to the qualification of witnesses, because convictions for many offenses clearly belonging to the *crimen falsi* of the civilians have not this effect. Of this sort are deceit in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news, and several others. On the other hand, it has been adjudged that persons were rendered infamous and therefore incompetent to testify by having been convicted of forgery, perjury, subornation of perjury, suppression of testimony by bribery or conspiracy to procure the absence of a witness, or other conspiracy, to accuse one of a crime, and barratry. And from these decisions it may be deduced that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud.

And that, if Your Honor please, is a true and correct definition as presented in the authorities. In 1 Starkie on Evidence the same view is presented. It was read by the other side, and will be found on pages 94-95, but this was omitted:

But this, it has been said, is to be understood of a conspiracy to charge a person with a capital offense, in which case, upon conviction, he is liable to the villainous judgment and to lose the freedom of the law. In a late case it was held, in the Ecclesiastical Court, by Sir W. Scott, that a conviction upon an indictment for a conspiracy to commit a fraud by raising the price of the public funds by means of false rumors did not render the affidavits of the party inadmissible. (Case of the Ville de Varsvie, 2 Dods. Adm. R., 174; and in the case of Crowther vs. Hopwood, 3 Starkie, c. 21, it was held that such a conviction did not render a witness incompetent in a court of law.)

So that whenever this question is fairly examined it will be found that the only class of conspiracies which are rendered infamous were those which involved the purity of the administration of justice, and that was the true policy of the case referred to by my Brother Wilson in Leach's Crown Law 582.

During the course of their confinement George Crossley, against whom they had been convicted of conspiring, was indicted at Hick's Hall for wilful and corrupt perjury, and the indictment being removed into the Court of King's Bench, came on to be tried before Mr. Justice Buller, at the sittings at Westminster, after Trinity Term, 1787. At the trial William Priddle was produced as a witness on the part of the prosecution, and being examined on the *voir dire*, he acknowledged that he had been convicted of the conspiracy above mentioned, and was then brought up under a habeas corpus from his confinement for that offense. The defendant's counsel objected to his being examined, and submitted to the court that a conviction of conspiracy rendered the party infamous, and destroyed his competency as a witness.

Mr. Justice Buller:

Conspiracy is a crime of a blacker dye than barratry, and the testimony of a person convicted of barratry has been rejected. It is now settled that it is the infamy of the crime which destroys the competency, and not the nature or mode of punishment. A conviction, therefore, of any offense which is comprehended under the denomination of *crimen falsi* destroys the competency of the person convicted, as perjury, forgery by the common law, &c.

THAT WAS A CASE OF THE REJECTION

of the testimony of Priddle because of perjury, because of false swearing. And so it will be found that this is the class of cases of conspiracy which have been regarded as infamous. There is this inclination to impart to the crimes a more serious character than Congress has done. This is what is attempted in vindication of the defendants by the positions which have been assumed from time to time in the progress of this discussion. In the U. S. vs. Coppersmith, 26 Int. Rev. Record, 398, is a case in the Circuit Court of the Western District of Tennessee in 1880 where this was held by Justice Hammond. It is only thus that it is possible for them to escape from the conclusion that an information for conspiracy may be filed in this court. This doctrine will appear distinctly in 3 Hughes, in the case of the United States vs. Baugh, 3 Hughes 7, 1st Federal Reporter, p. 784:

Under Federal laws nothing is felony unless expressly so declared by Congress, with the exception of capital offenses, and it has always been the policy of Congress to avoid as much as possible the multiplication of statutory felonies. The inclination of Congress is not to impart an infamous character to any offenses.

The inclination of Congress is, while maintaining by proper legislative acts, the dignity of the Government, to confine so far as possible within the limitation of misdemeanors, and hence it would be a forced and violent construction to hold, in the absence of an expression of the congressional purpose, that the crime of conspiracy under sec. 5440 was anything else than a misdemeanor. May I go a step further in regard to that? If Your Honor will turn to vol. 14, p. 484 of the 14 Statutes at Large, where this enactment originally appears, you will find that it is expressly declared to be a misdemeanor. It has been well established that in the interpretation of the Revised Statutes it becomes proper to refer to the original acts, especially as regards questions of doubt, that there may be ascertained correctly what was

THE MEANING OF THE LAW-MAKER

in the Revised Statutes. If in the original act it was declared a misdemeanor, how can it be regarded in the absence of any antagonistic declaration more than a misdemeanor? And if a simple misdemeanor, how can there properly be attached to it all the degradation and all the disgrace requisite to constitute an infamous crime? But the crime charged in the information is only conspiracy to defraud against five persons, two of whom were not officers and three of whom were. It embraces both classes; it involves no oath—the violation of no special obligation, especially as regards those who are not officers. It is not, therefore, infamous, if Your Honor please, in its nature. It consists simply of defrauding, and if there can be any light gathered from the punishment which is attached to it this may properly be referred to. That punishment is this: "All the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and imprisonment of not more than two years." It does not require imprisonment at hard labor. It may be tolerated or allowed, but it is not required; and in further exposition of the purposes of this act it may be proper to refer to its subsequent amendment, which will be found on page 484 of the supplement to the Revised Statutes. The punishment there is this:

That they shall be liable to a penalty of not more than $10,000 or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court.

IT IS THE SAME OFFENSE;

but Congress, in the act 1874, declares that the punishment may consist of a simple fine, or it may consist of imprisonment without a fine, or it may consist of both fine and imprisonment. When before has any Legislation treated an infamous crime with reference to its punishment, as Congress has the punishment of conspiracy, under section 5440? But this is not all. Conspiracy is one of the crimes which could be prosecuted in England by information. In Cole, criminal information, pages 29 and 30, this refererence will be found in a direct reference to conspiracies as constituting part of the crimes which could be prosecuted by information. They are repeatedly referred to. So, too, in Peterdorf, volume 10, pages 400-413, and in the case of Grover against Lockwood, 3 Starkey, 31, and in Tomlinson's Law Dictionary it is fully presented under the title Information, which contains a full, condensed, and clear treatment. The information was exhibited by the Attorney-General for conspiracy to defraud the revenue. It was brought for conspiracy alone. It was conspiracy affecting the revenues of the Government. The charge in the present information directly affects, too, the revenues. But it has been insisted that all the cases in which information has been used have been revenue cases, and Mr. Wilson, and perhaps Mr. Ingersoll

BECAME BOLD AND DEFIANT

on this, as some other points, and in clear tones challenged the production of any case of a contrary nature, and as he did so it was with difficulty that I refrained from exclaiming with Gulliver, "Bravo, little hero!" Why, if you will turn to the United States vs. Briddleman, 27 Internal Revenue Record, 277, you will find one case that did not relate to the revenue, but related to something entirely distinct and separate. It is a case of larceny and contained in this record. If Your Honor will turn to the United States against Yates, 6 Federal Reporter, 861, you will find this case, in the Eastern District of New York, Infamous Crime, fifth amendment: "The crime of passing counterfeit trade dollars is not an infamous crime within the meaning of the Fifth Amendment of the Constitution. Prosecutions for such offenses upon information filed by the District Attorney would not therefore violate the Constitution of the United States." Nor is that all. The 1st Federal Reporter, United States against Baugh, 784, was an information for embezzling letters, and that was sustained by Judge Hughes, so that it is far from correct that all the cases in which informations have been used have been revenue cases. They have not been. To these citations I will add several others: United States against Mann, in 1st Gallison; the United States against Waller, 1st Sawyer, 701. That is a case in which Justice Field decided misdemeanors must be prosecuted by information.

Mr. Wilson—What was that case for, Colonel?

Mr. Cook—Does it not appear what it was for? What was it for? I supposed you did not know. It was a misdemeanor, and not a capital or infamous crime. "We are of the opinion that an information may be filed by the district attorney in behalf of the United States in a national court for misdemeanors committed against the laws of the United States." Two things. It was against a law of the United States. So is this information. It was for a misdemeanor. The original act to which I have given Your Honor reference shows that this conspiracy was

REGARDED AS A MISDEMEANOR.

Hence the pertinency of this case. The United States against Bergman, 14 Blatchford; United States against Nagle, 17 Blatchford; The United States against Miller, 3 Hughes, page 553. This was an information founded on section 5440. This section makes conspiring by two or more persons to defraud the Government a punishable offense, and declares the commission of any act going to affect the object of the conspiracy by any one of the conspirators to be a punishable offense in all. That was under this very section, and was a proceeding at Norfolk, in the United States Circuit Court, Eastern District of Virginia. So that this very remedy has been adopted under this very section. I will leave these authorities and these points with an additional reference to the case in 6th Federal Report, which is comprehensive and pertinent. Andrew Yates was charged by the information with having passed counterfeit trade dollars with intent to defraud, and in violation of the statute of the United States made and provided. The question for determination, therefore, is whether the crime of passing counterfeit trade dollars is an infamous crime within the meaning of

THE FIFTH AMENDMENT OF THE CONSTITUTION.

The rule of the common law by which to declare and determine whether an act was infamous or not is given in 4th Sawyer, 214, where it is said, that at common law a crime involving the charge of falsehood may be infamous, not only as involving a falsehood of such a nature and purpose as makes it probable that the party committing is void of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice, and this act, the act of passing counterfeit coin with intent to defraud, is manifestly not infamous. The rule of the common law, as above stated, seems to be recognized in the statutes of the United States, inasmuch as section 5392 contains a specific provision that a conviction of perjury shall render the offender incapable of giving testimony in any court of the United States, and so far as I have discovered the same effect has not been given by statute to any other crime. But a prosecution of such an act by information has passed under the consideration of the Supreme Court without objection (U. S. vs. Isham, 17 Wallace, 496), and many offenses have been prosecuted by information both in the Circuit and District Courts of the United States. (U. S. vs. Maxwell, 3 Dillon.) There is one of the last cases decided in 1881, with regard to this question, decided in the clearest and most terse language. I have one more case only to refer to, Cross vs. United States, 149. I will only read the sillibus:

Congress has power to reduce a pre-existing felony to the proportion of a misdemeanor, when the penalty is not fixed the Constitution, and, though Congress cannot dispense with indictment in the process of punishment if the offense is infamous, it is equally clear that it has the power to reduce a crime from the grade of infamous to misdemeanor when the Constitution is silent as to the punishment and the infamy.

That is the opinion of the court of this District in June term. The court held that "offenses involving mere moral turpitude were not infamous; that to make an offense infamous there must be more," &c.

I HAVE NO MORE TO ADD

in regard to the infamy of the crime. I will hastily consider another question—how may an information be filed? That it may be filed has been established. If so, the inference is that it shall be done in the method which shall render it effective. If this be true, then by inevitable inference there should be no circumlocution in its presentation—no embarrassments, no useless delays—but preliminary examinations, rules to show cause, would encumber delay, and even to render ineffective. May not this be considered in reference to what Blackstone has said? He declares that the necessity for information arises largely from the importance of maintaining the Government, preserving its unity, upholding its rights; and this was necessary in this aspect of the case. The question, however it occurred, was up. Was this information to be filed, or shall the acts of wrong-doing embraced in it be held back from the court, and thus Thos. J. Brady and his associates be allowed an opportunity to escape the consequences of their act. There was no grand jury. This remedy was imperative for this case; it was indispensable. And agreeable to this view was the practice in England, as appears from 1 Chitty's Crim. Law, from the cases in 1 and 4 Burr, as others, and it was only as regards the one class of informations that a rule to show cause was necessary, namely, such as were filed at the instance of a private citizen. My Brother Wilson confessed what was distinct. In his citations on this point there is no instance in the English practice where an information filed *ex officio*, filed on behalf of the Crown without the intervention of a private prosecutor, when rules to show cause and protracted preliminary inquiries were adopted.

THERE IS MUCH FORCE.

If Your Honor please, in the argument which arises from the analogy. First, is any notice required by any established practice in the filing of an indictment? Never. The grand jury deliberate and determine whether the individual should be indicted. They consult with the district attorney, and he prepares the indictment. No notice precedes it whatever. If an information be similar to an indictment, except that it emanates from the official hands of the district attorney, without the intervention of the grand jury, why should there be notice of its filing? The analogy, if this were so, would be destroyed. It is enough that they are notified that it has been filed by a proper process in the court. The practice of filing informations, it is true, is not uniform. The English practice required no notice, required, in fact, no leave of court. The leave of court which is requisite to a filing of an information is probably under the English practice, which is inherited by this country from our ancestors, and the practice of filing an indictment itself a mark of respect to the court. An indictment, unless reported to Your Honor, could not be filed. An information, unless Your Honor should be notified of the filing, would be

IRREGULAR AND IMPROPER.

So it is in regard to informations. The District Attorney would act unwisely, and without proper professional etiquette, if he filed an information without notice to the court, but with that notice the preliminary act of filing the information is the act of an authorized officer. It would appear from the books in California and esewhere it is not the practice to file upon a notice. It seems that in some of the districts, as is stated in 1 Abbott and Dillon, that the Court will not allow an information to be filed only upon discretion of the Court, which is the better practice; that it most closely resembles, as far as the mere filing is concerned, the English practice, cannot well admit of any doubt. If the power to file resides in the representative of the Government, it requires no discretionary exercise of the power of the Court. It will be filed under the sanction and knowledge of the Court as a matter of course. Subsequent orders are required to be issued for arrest, and they will require the action of the Court. Hence it was that I stated in the outset that it was important to consider what the true question was before the Court. Because it does not follow, even if the oaths were insufficient to justify the holding to bail of the defendants, that the filing of the information should be

STRICKEN FROM THE RECORDS

of the court. Far from it. The information should remain filed properly; but if the defendants have been in any respect improperly arrested in the preliminary hearing, if further affidavits are required, they can be had. The basis for that lies in the filed information. It is asking too much to require that it be stricken fro the files. If one solitary improper act has occurred, if the warrant was improperly issued, if the parties were improperly brought into court, that can be corrected; but that is essentially different from wiping it out, as they seek to do, so that these parties may escape the penalty consequent upon their conduct. The better practice of the two would appear to b that which allows the officer representing the Government, upon his official oath and official solemnity of action, to file information, and when in the possession of the court all subsequent acts belong exclusively to the court, and I beg leave to say that not only my Brother Corkhill acted, in filing this, under his oath, but I too held a special commission on the files of this court, with my oath recorded and answered in the same manner. It follows therefore that the information has been

IN EVERY RESPECT PROPERLY FILED.

If so, the order permitting it to be filed cannot be rescinded. It cannot be stricken from the files; it must remain apart from any consideration of the warrant or of the affidavit on which it was based. It must be retained as the basis of a rule, if necessary to show cause or other proceedings if they are required. The defendants cannot escape, as they appear anxious to do, by striking out the information itself.

The court then took a recess for twenty minutes. After recess Colonel Cook continued his argument as follows:

If Your Honor please, while the motion, as confined to the information, does not include part of the order in relation to the arrest of the defendants, it is undoubtedly true that if proper reasons existed for it, if it appeared to the Court that the indictment was properly filed, *ex mere motu*, the order allowing it to be filed could perhaps be rescinded. The sufficiency therefore of the affidavits to justify the warrants issued for the arrest of the defendants may be properly considered. And first, what are they? What are their terms? What are their statements? This can be best determined by reading them calmly and tranquilly. The first is the affidavit of Mr. James, the Postmaster-General. He states that he is the Postmaster-General of the United States, thus lifting himself out of the realm of ordinary individuals, and presenting his affidavit

AS A DIGNIFIED OFFICIAL.

That as such he is the head of the Post-Office Department of the United States, and has been such since the 7th day of March, 1881; that he has read the foregoing information, and knows the contents thereof; that the same is true, as he states, upon information and belief; that his knowledge, information, and belief is derived from an examination of the records of said Department, including the orders and papers relating to the various matters set forth in said information, including increase of service and expedition, the reduction of service, the offer of sureties and the changing of routes, the position and action of Brady, French, and Turner, and also from the reports and statements made to him by the inspectors, agents, and other officers of the Post-Office Department, who have, by deponent's direction, been engaged for many months in a careful and minute examination and investigation of the transactions of the Post-Office Department, its officers and agents, so far as relates to contracts for carrying the mails and the mail service during the period from the beginning of the year 1877 to the month of March in the year 1881. Subscribed and sworn to before me this 29th day of September, 1881.

YOUR HONOR WILL OBSERVE,

in the first place, that this is the oath of one who is made the custodian, by virtue of the act of Congress, of the records and papers in the Post-Office Department. It is not the statement of an individual disconnected with them and having no official knowledge of them. The law places the custody of these papers under the control or in the hands of the Postmaster-General. What does he do? He states that, as the head of the Department, as the officer of the United States, entrusted with the custody of the papers, he has examined them carefully and fully, and from that personal examination of the records in his possession, and having read the statements made in relation to them in the information, they are true. Then, in addition to that, he says that his knowledge—not simply his information, but

HIS KNOWLEDGE, INFORMATION, AND BELIEF—

"is derived from an examination of the records of said Department, including the orders and papers relating to the various matters set forth in said information, including the increase of service and of expedition." Then, in addition to that, he makes this definite statement: That in addition to this, his knowledge, information, and belief arises from what? From his direct reference to the position and action of Brady, French, and Turner. It is, therefore, manifestly erroneous to assert that this statement is made simply and only upon information and belief. It is more; it uses the term "knowledge" directly in connection with "information and belief," and it refers to the actions of Brady, as set forth in the information, as being within the knowledge of the Postmaster-General. It is not, therefore,

A LOOSE, RECKLESS, INDIFFERENT STATEMENT,

made by a party who is indulging simply wild suspicion and conjecture. It is a transfer under the solemnity of an oath to the Department—first, of the information; second, of the knowledge; third, of the belief based upon that information and that knowledge of the Postmaster-General. What more could be asked? What more could be demanded? Mr. Woodward is also an officer of the Post-Office Department. That is set forth in his affidavit. He sets forth that he is an inspector of the Post-Office Department, and has been such inspector since the 14th of March, A. D. 1881; that as such inspector he has had, under the direction of the Postmaster-General, charge of an extended and minute investigation into the management of the mail service of the United States since 1877; that he has read the foregoing information, and that the facts therein stated are true, as deponent states after such examination; that he has examined the several contracts, orders, and papers therein referred to, and

THEIR CONTENTS ARE CORRECTLY STATED;

that he has procured the statements of various persons who were concerned in or connected with the transactions set out in said information, and that his information and belief as to the truth of the statements contained in said information is derived from said examination of said papers and from said statements. That, too, is the statement of a sworn officer of the Post-Office Department, and he presents to you the record of his investigation in the pathway of his duty as an inspector of the Post-Office Department. These are more than mere statements upon information and belief. They are the positive statements on the part of the Postmaster-General involving the knowledge and belief produced from that knowledge and information, including

THE ACTION OF BRADY, TURNER, AND FRENCH,

and then the corroborative affidavit of the officers whose peculiar duty it was to inspect the records and the papers. So that this amounts to more than an affidavit upon mere information and belief. Its statements embrace, let me repeat, knowledge, information, investigation, belief, conduct, acts of the accused. How could a preliminary information go beyond this? It is, therefore, not correct to declare, as has been done, that it is a mere statement upon information and belief. But, besides this, if this were so, if it was information and belief, would it not be sufficient? The article of the Constitution of the United States in relation to this subject is above mere construction of the changing views of the Judges of the Supreme Court of the United States.

No person shall be held to answer for a capital or other infamous offense unless upon the presentment of a grand jury. In criminal prosecutions all parties shall enjoy the right to a speedy trial.

And then comes the declaration of the Constitution, ever to be venerated and ever to be respected:

That no one shall be arrested except——

Upon what ground, if Your Honor please?

Except upon the ground of probable cause.

No one understands better than Your Honor—and that is what Story declares in the pages before me—that this provision of the Constitution was directed primarily against the issuing of general warrants for the search of property, of houses, and the arrest of individuals. But it includes more, it includes the arrest of individuals upon alleged crimes, and requires that that shall not occur; that no warrant shall be issued except upon probable cause. What is probable cause? Let us ascertain correctly. Bouvier defines it in the second volume of his Lexicon under the term *Probable*.

Probable cause: Such a state of facts as to make it a reasonable presumption that their supposed existence was the cause of action. When there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be a probable cause for making a charge against the accused, however malicious the intention of the accuser may have been.

PROBABLE CAUSE,

it thus appears, consists of presumption of the supposed existence of crime arising from the existence of facts and circumstances. "When there are grounds"—not for definite, final, and ultimate action, but "when there are grounds for suspicion that a person has committed a crime or misdemeanor, and public justice and the good of the community require that the matter should be examined, there is said to be probable cause for making a charge against the accused." And in Sergeant's treatise on constitutional law it is said, on page 254:

To warrant a commitment that proof would not be required which would be necessary to convict the person on a trial in chief, but the committing magistrate would require that probable cause be shown. Probable cause is a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged. When such probable cause is shown, it can be done away with only by its appearing that no such crime has been committed, or that the suspicion entertained of the prisoner is wholly groundless.

What could be more distinct and pertinent? "To warrant a commitment that proof would not be required which would be necessary to convict a person on a trial in chief, but only" probable cause.

MAY I SUGGEST TO YOUR HONOR

a mere passing reference to the text-books of our juvenile days, to the teachings of our primary logic in the schools? In that the distinction between the possible, the probable, and the certain is clearly drawn. There are three distinctive attributes of truth: First, the possible; second, the probable; third, the absolute. When the law, when the Constitution itself requires that no warrant shall be issued except on probable cause, it goes beyond the possible. It stops short of the certain and the absolute, and it rests upon the probable. If that be so, then this information, supported by these affidavits, is amply sufficient to justify the warrant of arrest which was issued. There was a reference made by one of the learned gentlemen who is absent to-day (Colonel Ingersoll) with an air of triumph, with the emotion of a Sir Oracle, to the case of the United States vs. Swartout, which engaged the attention of the Supreme Court in its earlier days, and he had the intellectual audacity to declare in the presence of Your Honor that Chief-Justice Marshall had held, as he maintained, that probable cause required some certain and absolute proof, while the pages of the book from which he read declare the fact that the judges of the Supreme Court were

DIVIDED UPON THE QUESTION

before them, and that Marshall entertained the view which he substantially announced in the celebrated Burr trial; and he says—I read from Burr's trial, vol. 1 Phila. Ed., p. 11—

In an application of this kind I certainly should not require that proof which would be necessary to convict the person to be committed on a trial in chief.

That is the utterance of Marshall.

The Chief Justice delivered the following opinion in the presence of a numerous audience, April 1, 1807:

Nor should I even require that which should absolutely convince my own mind of the guilt of the accused, but I ought to require, and should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime has been committed by the person charged with having committed it. I think the opinion entirely reliable that was quoted from Judge Blackstone when that learned and accurate commentator says: "If, upon an inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such case only it is lawful totally to discharge him; otherwise he must be committed to prison or give bail."

There are the utterances of one who long adorned with rare lustre and unusual learning the Supreme Bench of the United States. These utterances were made in a case which elicited the attention of the Nation in its earlier days, and which convulsed her in all her parts. Then he proceeds to amplify these views, and in the progress of the case admitted a letter, to which he refers in these terms:

It is, however, urged that the declaration of Swartout may be connected with the letter and used against Colonel Burr. Although a confession of one man cannot criminate another, yet I incline to think that upon a mere inquiry into probable cause, the declaration of Swartout made on this particular occasion may be used against Colonel Burr.

And then he admits, not a copy sworn to, not the original letter, but a secondary copy, made by one who heard the letter read. The same doctrine may be found in 24 Howard, Bishop's Criminal Proceedings, 713, and elsewhere. If this be the true doctrine of the law, why this assailment of the affidavits to this information? In Bishop it is said:

In English practice the information is not verified by the informing officer's oath, though where it is not filed *ex officio* the application for it by a private person is; but very largely, though perhaps not universally, by statutes in our States the information must be supplemented by the informing officer's oath, and verification on information and belief is adequate.

I might enlarge, by trespassing on Your Honor's time, with the citation of corresponding authorities against all this. There are two authorities presented; one is the charge of Justice Field to the grand jury. In that case he admits in the outset, in express terms, the propriety of filing informations. He declares that in his view the evidence to justify the finding of information should be positive and conclusive before a grand jury—sufficient to satisfy the grand jury absolutely of the guilt of the accused. But how can that be? A hearing before the grand jury is *ex necessitate rei partial*; it is *ex-parte*. The question actually of the

GUILT OR INNOCENCE OF THE ACCUSED

can only be fully considered when the case passes from the grand jury room to this temple of justice, and when all the evidence is presented critically and carefully to the petit jury. There is one other case that has been cited—a rule adopted in the Northren District of Georgia. Justice Bradley says:

I am informed by his honor, the district judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury, to warrant an indictment, or before the traverse jury, to justify a conviction; whereby much useless expense is caused to the Government, and the personal liberty of the people is unnecessarily interfered with.

That was the evil to which the rule was directed.

One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer * * * who swears that upon information he has reason to believe, and does believe, that the person charged has committed the offense.

That was all—upon the unofficial, unsustained, reckless statements of mere individuals in the community.

Mr. Wilson—He says "officers," I think.

Mr. Cook (Reading)—"One cause of this evil seems to be the fact that warrants are issued upon the affidavits of some officer who, upon the relation of others whose names are not disclosed, swears that upon information he has reason to believe, and does believe," &c. It was this practice that was condemned—the officer in Georgia assuming, upon information obtained from undesignated sources, to make affidavits and arrests for the violation of the revenue laws. There is no analogy between such oaths and that on which this information rests; it refers to records, it refers to means, it refers to deeds, it refers to actions, it refers to knowledge as well as information and belief. The court further say that—

The probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself—

That is what was done on the filing of this information—

and not merely to an official accuser, so that he (the magistrate) may exercise his own judgment on the sufficiency of the grounds shown for believing the accused person guilty, and this ground must amount to—

What?—

this ground must amount to a probable cause of belief or—

What?—

suspicion of the party's guilt.

That is it in harmony with the utterance of Marshall, in harmony with the definitions of probable cause. Not to the evidence necessary to convict, if Your Honor please, but it must amount to probable cause of belief only. What that is is determined by the alternative terms used "or suspicion of the party's guilt." That authority vindicates the sufficiency of these oaths, instead of destroying them. With that I may pass from this inquiry as to the sufficiency of the affidavits in terms considered in reference to the source from which they emanated, considered in reference to the close and inseparable connection between the facts of the information and the statements of the affidavits, can in reference to the disclosure of the grounds upon which knowledge and information may be productive of belief. There is probable cause—strong suspicion of the perpetration of the crime alleged to have been committed in this paper laid before the court. Unless in preliminary inquiries the court is to be transformed into the trial judge, and unless the evidence is to be demanded requisite to be laid before the petit jury, there is an abundance in these affidavits to justify the issuing of the warrants; and if so sufficient to hold the defendants under this to answer the charge

CONTAINED IN THE INFORMATION.

This conducts me to this remarkable position—let me present it in the form of interrogatories: Is there any offense possible? Has any been created? Does any exist? Is there any at common law? This may not be maintained. It is not necessary; but it is possible that a close and critical examination might sustain the proposition that in this District all common law offenses that existed in Maryland in 1801 have been transferred to the Capital of the Nation. In the great case of Kimball vs. Stokes it was determined by the Supreme Court of the United States that the common law remedies, embracing mandamus, existed in the District of Columbia, and that decision has recently been affirmed with emphasis in the United States vs. Schurz, 102 U. S. R., 394, in which the courts say:

Thus the argument is precisely the same as it was in Kendall vs. The United States. The revision has merely separated the different sections. The provision is repeated, and we think both of them are contained in the construction placed upon them in this court in Kendall vs. The United States and the subsequent cases. The act amends section 763 R. S. D. C. by enacting "that said court shall have cognizance of all crimes and offenses committed within said District." We are of the opinion that the authority to issue writs of mandamus in cases where the parties are by common law entitled to them is vested in the Supreme Court of the United States.

If Your Honor please, there is no law of the United States declaring that a conspiracy to blast the reputation of a citizen shall be regarded as a crime. May it not be, as it was a crime to do any act that affected the administration of justice or its purity and sanctity in England, that that right passed across the Atlantic, became part of

THE LAW OF MARYLAND,

and was transferred by the act of sessions into this District? I will not press these questions in this form upon this court; but it may be that there is by virtue of the sessions and the adoption in the District of the great mass of the common law, civil and criminal, as it existed in Maryland, power, apart from any special statutory provision to protect the purity, to maintain the majesty, to uphold the sanctity, and perpetuate the life of this great Government. But section 5440 is explicit and conclusive.

If two or more persons conspire either to commit any offense—

Any designated offense, any definite and described offense—

against the United States, or to defraud the United States in any manner—

More than that, Your Honor—

or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be deemed guilty and shall be punishable.

It touches every approach to an attempt to cheat or defraud the Nation; it includes not only specified crimes, but any act that would corrupt the fountains of justice; that would poison the revenues of the Department; that in any form would by reason of this corruption and fraud be an attempt to tear into atoms and fragments the banner of the Union. For, if there be one mode more than another by which each star may be wiped out of

THE BANNER OF BLUE,

it would be by the touch of fraud and corruption, and not by the convulsions, and fire, and flames, and madness of the battle field. No, no; it is the virus that poisons the heads of the Departments; it is the virus that corrupts the officials; it is the virus that passes from the higher to the lower, until it embraces clerks, includes lobbyists, under the name of practitioners in the executive Departments, and that will place the moaning and hooting owl and the flopping bat upon the ruined pillars of our temple of liberty. And hence it is that now and to day, to prevent this result, this information has been filed. But there is a direct authority on this point. Let me turn to the case of U. S. vs. Hirsh, where the opinion was delivered by Justice Miller, and is reported in 100 U. S. R. 34.

The gravamen of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common law definition of conspiracy is necessary to complete the offense, to wit: Some act done to effect the object of the conspiracy. It remains true that the combination of minds in an unlawful purpose is the foundation of the offense, and that a party who did not join in the previous conspiracy cannot under this section be convicted of an overt act.

But it is immaterial when he joins, for what purpose he joins, if the conspiracy existed, and he in any manner connected himself with it, it was sufficient. Then follows a citation of section 5440 and then the exposition of the Court:

The conspiracy here described is a conspiracy to commit any offense against the United States. The fraud mentioned is "any fraud against the United States." It may be against coin, or consist in cheating the Government of its lands or other property. Since, then, this section does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States and every form of conspiracy to defraud them, it is difficulty to see how the crimes it defines, and which are punishable under it, can be said to arise under the revenue laws by the general law against all conspiracies.

THERE IS A PERFECT ANSWER

to the learned, elaborate, and convulsive argument presented by one or two of the learned gentlemen on Saturday. The Supreme Court adopts the idea which Your Honor suggested to Judge Wilson during the discussion of the point. That is not the only authority. They accumulate. They came traveling down to us like the light of the planets, across the spaces of time and from different sources. I hold in my hand an opinion found in Woods Reports, Vol. 3, in which the opinion was delivered by Judge Woods, who is now a member of the Supreme Court of the United States.

Mr. Totten—What page?

Mr. Cook—It commences on page 47, and terminates triumphantly [laughter] for the United States on page 53. It will be necessary to refer to it presently on another point.

Mr. Wilson—Who was the defendant in that case?

Mr. Cook—It is entitled the case of the United States vs. Deumel.

In other words, it is claimed that because the act of March 2, 1867 (*supra*), does not in terms forbid the prosecution of fraudulent suits against the United States in the Court of Claims, and the recovery of judgments and the receipt of money thereon, by means of false and fraudulent claims and perjured testimony, a conspiracy to commence and carry on to a final judgment, such a suit cannot be punished under section 31 of the said act above quoted. This, it seems to me, is too narrow a reading of the section. It denounces a conspiracy to defraud the United States, not simply by committing one or more of the offenses specified in the act, but to defraud the United States in any manner whatever, or to commit any offense against the laws of the United States. The language of the section is too broad to be confined within the narrow range sought to be imposed upon it.

So that this position is perfectly answered, not so much by my own utterances as by the exposition of the law by the Supreme Court and by one of its present justices. Such authority will unquestionably receive due weight from Your Honor. They would not with Colonel Ingersoll. He seems to ridicule authorities, although he may make a feeble effort to read from books, and some incorrectly copied by some one unknown into manuscript. He seems to consider it sufficient to present his individual views without specific reference to authority. But all this is a bold attempt, if Your Honor please, to escape an investigation of the charges contained in the information, and the defendants, through their attorneys, have the intellect and moral courage to invoke Your Honor's assistance to establish this position; to declare judicially that frauds may be perpetrated *ad libitum* against the United States, and unless they involve a designated and specified offense, the perpetrators cannot be subjected to punishment by the law. I leave that point with Your Honor in the light of the decisions to which I have referred. But, so far as Thomas J. Brady is concerned, a kindred proposition is advanced. It is this: That, as respects the mail contracts,

EITHER INCREASE OR DECREASE

of expeditious service, and all associated matters, he acted as the Second Assistant Postmaster-General, and as an executive officer with discretionary power, and that, no matter how exercised, legally or illegally, or from what motive, however unjust or through what combinations, his acts cannot be regarded as criminal, nor can he be called upon to respond to any criminal proceeding. We are told that Minerva sprang full armed from the cleft brain of Jupiter; but in whose brain this conception and position originated it is impossible to determine. It is proper to consider the consequences of the construction of law or the enunciation of the principle involved. There has been an attempt to support it by a single citation. The entire reference establishes a contrary doctrine. Let me refer to it. It is in 2 Wharton, sec. 1571:

To subject the superior officers of Government, upon whose uninterrupted presence at the helm the safety of the state depends, to indictments for misconduct in office would be injurious to the body politic, and consequently in such cases impeachment is the sole instrument of penal provision. This principle applies to the executive officers of the Government, so far as such officers are clothed with discretion,—

For that there is no authority given—

to the legislature, and clearly to the judges of courts of record so far as concerns their judicial as distinguished from their ministerial acts. Justices of the peace are, however, subject to indictment for all acts not committed within the range of judicial discretion.

Now mark:

Oppression, fraud, and corruption. It is a misdemeanor at common law for a public officer in the exercise of his office to abuse any discretionary power with which he is invested by law, from any improper motive. In such cases the existence of the motive may be inferred either from the nature of the act or from the circumstances of the whole case. Whether it is otherwise of an illegal exercise of authority caused by mistake as to the law, made in good faith, is hereafter discussed.

Then there are references given. The following illustrations are given by Sir J. Stevenson in his "Digest of Criminal Law:"

A and B, justices of the peace, refused licenses to keepers of public houses because they refused to vote as the justices wished. A and B commit oppression.

Let me pass to others:

A, an accountant in the office of the Paymaster-General, fraudulently omits to make certain entries in his account, whereby he enables the cashier to retain large sums of money in his own possession and to appropriate the interest on such sums to himself after the time when they ought to have been paid to the crown. A committed a misdemeanor. (Rex vs. Bembridge, 3 Douglass, 327.)

A, a commissary-general of stores in the West Indies, makes contracts with B to supply stores, on the condition that B should divide with A. A commits a misdemeanor. Rex vs. Jones, 31 State Trials, 251.)

THERE ARE MANY OTHER CASES.

So that the very authority produced, when read *in extenso*, establishes the contrary doctrine assumed on the part of the defense. But in this court the question may be regarded as settled. On the records of the Criminal Court of the District of Columbia stand indictments and convictions and two trials and ultimate acquittals on the facts of those cases—The United States vs. The Assistant Secretary of the Treasury of the United States, The United States vs. The Commissioner of Customs, The United States vs. A Clerk, and other cases in which I had the honor to appear for the defendants, with the present Attorney-General, with the lamented Mr. Carpenter, and with others; so that this position is perfectly and effectually answered. But if this were otherwise it would not destroy the information. It would permit Mr. Brady only to go forth a conquering hero; it would leave Brown; it would leave Turner; it would leave French; it would leave McDonough. Indeed, so earnest and almost at times devoted was my Brother Wilson to Mr. Thomas J. Brady that I would not have been surprised if he had broken out in the words of the poet:

Come, rest in this bosom, my own stricken deer;
Though the herd should forsake thee, thy home shall be here,
I know not, I care not, if guilt's in thy heart,
I know that I love thee, whatever thou art.

And I should not be surprised if my amiable and kind Brother Totten, when he appears to address the court, should take a step in advance in the earnestness of his devotion to Mr. Thomas J. Brady, and say:

Oh, come rest in this bosom, my own stricken deer,
Though the cruel herd should forsake thee, thy home shall be here.
I know not, I care not, if guilt's in thy deeds and thy heart;
But this I know, that I, too, love thee, whatever thou art.

In view of the last two positions, what becomes of the reference to the grand jury? Its eulogy has been pronounced in painted words, in glowing diction, in earnest sentences. But these positions, advanced before all others on the part of the defence, enunciate the fact that no human power, no investigation of the grand jury can disturb Mr. Thomas J. Brady in the magnitude and tranquility of his repose. Why eulogize the grand jury on his behalf when he stands up before Your Honor and declares there is no thunderbolt forged by the American people that dare touch his athletic and pure form. Because he was once invested with the robes of Assistant Postmaster-General, after it is too late to impeach him, if he could have been impeached, after the wrongdoings have been discovered, he declares that he is above the law, above the

GREAT MAJESTY OF THE GOVERNMENT.

He has only to go one or two steps farther and place himself on a pinnacle of elevation and declare he is above all moral law and moral conviction, and bid defiance to the fire and flames and utterances of Sinai itself. That is his true position. No law, human or divine, can be invoked against Thomas J. Brady! Let me give Your Honor a reference to the grand-jury system from one of the Justices of the

SUPREME COURT OF THE UNITED STATES:

It is very doubtful if that is a wise provision. There are a great many States seeking to get rid of it. Instead of a bulwark it has been made a stumbling-block.

Those are the words of Justice Miller, of the Supreme Court of the United States.

Mr. Totten—Where?

Mr. Cook—In his law lectures, delivered in the District of Columbia, published by Morrison Brothers, on Pennsylvania avenue.

Mr. Wilson—To be found in your library?

Mr. Cook—Yes, to be found in my library, and I would rather make the loan of that to my brethren than I would to furnish them with a bottle of champagne, though they would prefer the latter.

Mr. Totten—It would do us more good.

Mr. Cook—I was correct in my announcement, or else I would not have made it. It is finally maintained that even if a crime exists, if the alleged discretion of Brady cannot be a helmet and a shield for him, and if the defendants can be prosecuted through and as filed, still the information is defective and insufficient. Very briefly let me refer to it; and first of all it contains three counts. What does it charge? In the first count it charges that Brady, French, Turner, McDonough, and Brown knowingly, wilfully, fraudulently, unlawfully, and corruptly did conspire, combine, confederate, and agree together between and among themselves to defraud the United States of America out of large sums of money. There is a clear and distinct charge of a corrupt and fraudulent combination to defraud the United States of America—to use the words of Justice Miller in the case in 100 U. S.—"to cheat the United States." It then proceeds, not to make additional charges, but to present to the court overt acts which it is assumed will sustain the charge of corrupt combination and conspiracy to defraud. This conspiracy is associated in the information with route 40,101, with the carrying of the mail upon that route, so that it is distinct and clear.

THE SECOND COUNT

in its phraseology differs only from the first in that it declares that the same parties did unlawfully, fraudulently, maliciously, and corruptly conspire, combine, confederate, and agree together, between and among themselves, and with certain other persons unknown, unlawfully to defraud the United States of America out of large sums of money—namely, $330,000—in connection with the carrying of the United States mail and the compensation therefor from the 1st day of July, A. D. 1878, to the 30th of June, 1882, from Prescott, in the Territory of Arizona, to Santa Fe, in the Territory of New Mexico, on route 40,101. It then proceeds to set forth the characters of the various defendants in their official and individual relations. It then goes beyond that, and sets forth their overt acts. It charges conspiracy and combination between Brown and Brady, by which Brown obtained, as a consequence of

THE EXPEDITING OF THE ROUTE,

from $12,000 to $16,000. It charges distinctly in harmony with section 5440, which says that it may be a conspiracy to defraud in any manner for any purpose. It was not necessary that Thomas J. Brady—and the proof will develop that fact; the fact will enlighten that point—it was not necessary that Thomas J. Brady receive any portion of this money. If he conspired with Brown and with McDonough and others to have the amount increased, by which Brown could make from $12,000 to $16,000, it inculpates Brady as well as Brown under the law as expounded by the Supreme Court. That is not all. Other acts of fraud and corruption—overt acts—are set forth in support of this charge. The third count is substantially the same. Is this sufficient?

ACCORDING TO THE CASE

of the United States vs. Cruikshank it is. That case requires not that the means be all set out, because the overt acts take the place of the means. That is not all. If there was not a sufficient setting out of the particulars I need not cite authorities, as they exist in Bishop and Wharton, to Your Honor to establish this proposition that bills of particulars may be demanded in cases of conspiracy. If there be obscurity in cases of information, under the law of conspiracy bills of particulars may be demanded and all the darkness be removed. But that is not all. I hold in my hand the case of the United States vs. Deumee et al., 3 Woods:

An indictment for conspiracy to do an unlawful act need not aver the means agreed on whereby the conspiracy was to be carried into effect. The indictment for conspiracy, under section 5440, which avers the conspiracy and the overt acts done to carry it into effect, is sufficient, without stating the means agreed on to accomplish the purpose of the conspiracy.

Woods delivered the opinion. He now graces the higher court. He says:

It is objected to the indictment that it does not set out and aver the means in which the means whereby the object of the conspiracy charged shall be carried into effect, and that the averments setting out the overt act done in furtherance of the conspiracy do not supply this defect.

WHAT WAS THE CHARGE,

in part, in that indictment? Let me give it to Your Honor. The indictment charged that "Harriet A. Mills and others, late of the said district of Louisiana, did, on the 1st day of March, A. D. 1874, at and within the said State of Louisiana, and in the district of Louisiana aforesaid, and within the jurisdiction of said court, with force and arms, unlawfully and wickedly conspire, combine, confederate, and agree together among themselves, and with Martha L. Knight, Joseph P. Murphy, and divers other evil-disposed persons, whose names are as yet to the grand jurors unknown, unlawfully and fraudulently to defraud the United States of America of large sums of money—to wit, $40,000 lawful money of the United States of the property and moneys of the United States." And then it sets out the overt acts.

THIS INFORMATION

in the second and third counts is more definite, for it designates the transaction in connection with which the fraud is alleged to have been perpetrated—to-wit: the carrying of the United States mails on a particular route within a designated period; and this is more definite and more clear than the indictment I have read from. The court proceeds:

There is much conflict in the adjudged cases on the point whether, in an indictment for conspiracy to cheat and defraud, it is necessary to aver the means agreed on to carry the conspiracy into effect. On the other hand, it is the settled English rule that the words "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud one of his goods and chattels" contains a sufficient allegation of conspiracy without mentioning the means (2 Bishop's Criminal Law, &c.). A somewhat careful consideration of the authorities convinces me that the better reasoning is with those who deny the necessity of setting out the means by which the conspiracy shall be carried into effect. In my opinion, therefore, this indictment, which avers the conspiracy and then sets out the overt acts done to carry it into effect, is sufficient, and it is not necessary to aver the means agreed on to effect the conspiracy. The averment of the acts done to effect the object of the conspiracy, and which must be proven to sustain the indictment, is more than the equivalent of an averment of means agreed on to carry it into effect. The objection to the indictment is not well taken.

ONE OTHER AUTHORITY

on that subject, in the form of a precedent which received the sanction of the Supreme Court of New Jersey. It is in "Precedents and Indictments," in the last volume of Wharton, last edition. It is stated there that J. W. and others were commissioners to make an estimate of the damages to be sustained. It sets forth their several positions, and then charges conspiracy in these terms:

The grand jurors aforesaid, upon their oaths aforesaid, do further protest that said J. C. so being then and there one of the commissioners for the opening of said F street, and chairman of such commission, and the said W. S. being then and there an alderman of said city aforesaid, being evil-disposed and dishonest persons, and wickedly devising, contriving, and intending, and knowingly, corruptly, and unlawfully to cheat and defraud the mayor and common council of the city of N. of the money of said mayor and said council, on the —— day of ——, and within the jurisdiction, &c., did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together to cheat and defraud the said mayor and common council of the city of N. of the moneys, namely: The sum of —— of the said mayor and common council of the city of N., and other valuable things.

THIS INFORMATION CHARGES

clearly and distinctly, in harmony with these forms and authorities, that Thomas J. Brady, Turner, French, Brown, and McDonough conspired to defraud and cheat the United States out of large sums of money in connection with carrying the United States mails and the compensation therefor from Prescott to Santa Fe, on route 40,101, clear and distinct, and it notifies of the change and presents the overt acts which it is expected can be maintained by proof to support the charge. That brings me, if Your Honor please, toward the conclusion of what I desire to present to the consideration of the Court. I will not dwell longer upon this information. It has been pronounced absurd, contradictory, and ridiculous. But when the eye of pure, enlightened criticism is applied to it, it will be found that it is a clear, distinct, and plain statement of the crime embraced in it, and one that will justify by ample proof the conviction of the defendants unless they can vindicate themselves—not by extraordinary and peculiar legal positions, but by an accumulation of facts from the accusations

CONTAINED IN THE INFORMATION.

It is said that there has been delay. Why, Your Honor, Thomas J. Brady, until March last, and for years prior, stood as with a flaming sword at the entrance portals of the Post-Office Department. He spake and it was done. He commanded and the command was obeyed. Let me not misrepresent him. Let me do him no injustice. In a paper filed before the Congress of the United States in 1880, he says:

While done, of course, by authority and in the name of the Postmaster-General, yet all increase of the service, both by additional service put on and by provision for increased celerity, has been made under my personal supervision and by my express direction.

It was only when Thomas J. Brady was requested to disappear from the Post-Office Department that an opportunity was afforded to examine his transactions and his records, concealed as they were among a mass of documents and fugitive pieces of paper. And how, with what propriety, in view of this fact, does it become the defendants to chide the United States for delay? It was no easy task to ascertain the accumulations of filth and wrong in the Augean stables, the keys and locks to which had been so long in the possession of Thomas J. Brady; and it has required almost herculean power to let in the streams of purity upon the deeds that were perpetrated while he presided over that Department. It was inevitable delay. There may be more. But, if Your Honor please, there are truths in the world, and one comes from those volumes before you (referring to the copies of the New Testament used in the administration of oaths to witnesses),

"YOUR SINS WILL FIND YOU OUT."

It may require time. It may have been sown amid the sunshine of prosperity and tranquility, but the rending storm of investigation will come, when all iniquity will be exposed.

The mills of the Gods grind slow
But grind exceeding small.

It requires time for the avenging Gods to put their grinding mills in operation, but it will be done. May I go one step further? Going back to the days of our school-boyhood; *Facilis descensus Averni; sed revocare gradum superasque evadere auras, hic opus, hic labor est*—it is easy to go down to hell (to the Tartarean regions); it is more difficult to come back to the realms of purity; that cannot be done by an attempt to evade this information filed against Thomas J. Brady. Your Honor, but one thing more, and I am done.

STOP! STOP! STOP!

was the wild and vociferous cry of Colonel Ingersoll in the conclusion of his eloquent appeal. Why, "Stop, stop, stop!" was an appropriate cry for the defendants. It is the cry of detected guilt everywhere. It is the cry of the red-handed murderer at the point of his smoking pistol—"stop!" Amid flames that ignite the habitation of the citizen at the midnight hour by the fagot of the incendiary is heard the cry of "stop! stop! stop!" It has been the cry of guilt from the days of Eden, when the guilty pair attempted to protect themselves by a resort to their fig leaves up until the present hour. These fig leaves of technicalities can no more preserve these defendants from a fair, full, and just trial before twelve of their anointed countrymen than could the fig leaves of Eden protect Adam and Eve from the consequences of their guilt. It is too thin [laughter] a covering.

BUT THERE IS ANOTHER CRY

that comes down the ages wherever manhood has struggled for its rights. It is heard everywhere on the field of conflict for the true and great. It is the cry of "Go on, go on, go on!" It is the cry that to-day in reference to this information comes from the living and from the dead; from the past, and rolls up to us from the future. "Go on!" There is a form that passes and rises before me, of one over whom a Nation's tears have recently fallen. I see him now as I saw him in the White House a few nights before he was stricken down, and from his pale, white lips comes to me, at least, the cry of "Go on, go on, go on." And, if Your Honor permit it, I will go on, with the aid of my brethren, of a traduced and denounced Attorney-General, whose life is without stain and spotless, of a vituperated Postmaster-General, who from childhood's hour has had no accusation against him. With the aid of my noble, venerable, learned brother, (Mr. Brewster), and my absent associate (Mr. Bliss,) and the indulgence of Your Honor, I will "go